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ILLEGALITY OF PLAINTIFF'S OWN USE, AS BAR TO RECOVERY FROM UPPER RIPARIAN OWNER FOR DIVERSION.

The case of *Auger & Simon Silk Dyeing Co. v. East Jersey Water Co. et al.*¹ involves two rather novel phases of the "plaintiff-wrongdoer" doctrine, as applied to riparian proprietors, and which in this particular situation caused a strong dissent by Judges Garrison, Trenchard, Black, White and Terhune, from the majority decision. The plaintiff had sued the defendants in a lower court for diversion of water such as to interfere with plaintiff's use of its dye works, and had recovered substantial damages. On appeal the decision was reversed and new trial awarded, on the ground that, since plaintiff's own use of the water in its dye works so polluted the stream as to constitute a

¹96 Atl. (N. J.) 60.

public nuisance, and was thus not a reasonable use, plaintiff was entitled to no more than nominal damages, if any.

The right of a riparian owner to a reasonable use of passing water is appurtenant to the soil² and its mere invasion implies damage.³ The existence of the right does not depend upon the actual use. A plaintiff is not bound to show that at the time he is making any use.⁴ He may even, in the past, have committed the same misuse for which he is now suing the defendant.⁵ Consequently when the majority opinion in the principal case intimates that the plaintiff's misuse might bar recovery altogether that intimation can be justified only if the act in question falls within one or more of certain recognized classes that so operate. These are: (a) unlawful acts contributing as a cause (not merely a condition) of the harm; (b) acts violating a criminal law designed to prevent the entire transaction in which the plaintiff is engaged; (c) acts violating a civil or criminal law whose main purpose is to protect an interest of the defendant's which the plaintiff is now attempting to injure.⁶ Obviously the nuisance committed here by the plaintiff in the course of its business does not fall within the first two groups. As to the third it is not enough to say the defendant is a member of the state, and its interest as member is being attacked. This reasoning would prevent suit by any law breaker. As an individual, defendant has the right that the stream flowing past it shall not be polluted, but this right is not being invaded for the very good reason that plaintiff's dye works is situated lower down the stream. If then, plaintiff's illegal action is not such as to defeat altogether its right of recovery, should the illegality operate to reduce the damages to a merely nominal amount?

"Damages are given as a compensation, recompense or satisfaction to the plaintiff for injury actually received by him from

² *Kraver v. Smith*, 177 S. W. (Ky.) 286.

³ *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 33 Mass. (16 Pick.) 241; *McEvoy v. Gallagher*, 107 Wis. 331; *Parker v. Griswold*, 17 Conn. 288; *Newhall v. Ireson*, 62 Mass. (8 Cush.) 595; *Stotwell v. Lincoln*, 77 Mass. (11 Gray) 434; *Webb v. Portland Mfg. Co.*, Fed. Cas. 17, 323 (3^d Sumn. 189); *Whipple v. Cumberland Mfg. Co.*, Fed. Cas. 17, 516 (2 Story 661).

⁴ *Southern Marble Co. v. Darnell*, 94 Ga. 231; *Hogg v. Connellsville Water Co.*, 168 Pa. 456; *Ellis v. Tone*, 58 Cal. 289.

⁵ *Watson v. Town of New Milford*, 72 Conn. 561.

⁶ *Wigmore, Torts*, Vol. II, p. 885.

the defendant."⁷ The measure of damages here is, roughly, the pecuniary loss resultant from loss of use of the water including permanent diminution in market value of the land and improvements.⁸ The majority opinion in the principal case denies that plaintiff can measure its damages by its loss in being "deprived of the means of an illegal act."⁹ This denial, it will be noted, assumes two things; that value is value only in so far as the act creating it is legal, and secondly that the whole value lost to plaintiff by defendant's diversion had been created solely by its illegal act in polluting the stream. The second assumption is undoubtedly far fetched—as an incident to the profitable running of its dye works it may happen that the water discharged into the stream is impregnated with refuse, but surely this incident is not a complete cause or even essential condition. It might be argued that deducting the expense saved—and thus value created—by the illegal act of discharging the water used without removing the impurities, there still remains a very considerable legally created value, for whose destruction the plaintiff has a right to compensation. The fact that the evidence can not establish this amount of damages with perfect certainty need not bar recovery.¹⁰

But why is it necessary to go to that extreme? In point of fact the plaintiff has suffered financial loss. The minority view more logically holds that inasmuch as the illegality of the plaintiff's act is not so much of the essence as to deprive it altogether of a right of action, such illegality should not speak against the actual damage the plaintiff has sustained. "The responsibility of the plaintiff to lower riparian owners and its liability to the state of New Jersey or some of its public agents are distinct questions that could not be tried out in this action."¹¹

C. B.

⁷ Greenleaf, Evidence (14th Ed.) § 253.

⁸ *Rider v. York Haven Water & Power Co.*, 95 Atl. (Pa.) 803; *Jones v. Sewer Improvement Dist. No. 3 of City of Rogers*, 177 S. W. (Ark.) 888; *Wasoto & B. M. R. Co. v. Hensley*, 148 Ky. 366; *King v. Board of Council of City of Danville*, 32 Ky. Law Rep. 1188; *Commrs. of Aberdeen v. Bradford*, 94 Md. 670; *Sparks Mfg. Co. v. Town of Newton*, 45 Atl. (N. J.) 596; *Gallagher v. Kingston Water Co.*, 164 N. Y. 602.

⁹ *Auger & Simon Silk Dyeing Co. v. East Jersey Water Co.*, supra.

¹⁰ *Bigbee Fertilizer Co. v. Scott*, 56 So. (Ala.) 834; *Wall v. Hardwood Mfg. Co.*, 127 La. 959.

¹¹ *Auger & Simon Silk Dyeing Co. v. East Jersey Water Co.*, supra.